

1 SEYFARTH SHAW LLP
2 Daniel C. Whang (SBN 223451)
dwhang@seyfarth.com
3 Laura E. Heyne (SBN 279478)
lheyne@seyfarth.com
4 2029 Century Park East, Suite 3500
Los Angeles, California 90067-3021
Telephone: (310) 277-7200
5 Facsimile: (310) 201-5219

6 Attorneys for Defendants
7 THE AMERICAN BOTTLING COMPANY;
KEURIG DR PEPPER INC.; and TAYLOR
8 MARCUS

9

10 UNITED STATES DISTRICT COURT
11 EASTERN DISTRICT OF CALIFORNIA

12

13 FRANCISCO BELLO, an individual and
on behalf of all others similarly situated,

14 Plaintiff,

15 v.

16 THE AMERICAN BOTTLING
COMPANY, a Delaware corporation;
17 KEURIG DR PEPPER INC., a Delaware
corporation; TAYLOR MARCUS, an
18 individual; and DOES 1 through 100,
inclusive

19 Defendants.

20 Case No. _____

21

22 **DEFENDANTS' NOTICE OF
REMOVAL OF CIVIL ACTION TO
THE UNITED STATES DISTRICT
COURT**

23 [San Joaquin County Superior Court
Case No. STK-CV-UOE-2022-7696]

24 Complaint Filed: August 31, 2022

25 Trial Date: None Set

TABLE OF CONTENTS

I.	BACKGROUND	1
II.	TIMELINESS OF REMOVAL	2
III.	INDIVIDUAL PAGA ACTIONS, LIKE THIS ONE, ARE SUBJECT TO REMOVAL BASED ON DIVERSITY OF CITIZENSHIP	2
IV.	JURISDICTION BASED ON DIVERSITY OF CITIZENSHIP	4
	A. Plaintiff Is A Citizen of California.....	4
	B. Defendants ABC and KDP Are Not Citizens Of California.....	4
	C. The Citizenship of “Sham” Defendant Taylor Marcus Must Be Disregarded.	6
	D. Doe Defendants Have No Bearing on Diversity.....	8
V.	AMOUNT IN CONTROVERSY	9
	A. Plaintiff’s Individual PAGA Claim.....	10
	1. PAGA Period and Pay Periods	10
	2. PAGA Penalties Under Labor Code Section 210	10
	3. PAGA Penalties Under Labor Code Section 226.3	12
	4. PAGA Penalties Under Labor Code Section 558	12
	5. PAGA Penalties Under Labor Code Section 1197.1	13
	6. PAGA Penalties Under Labor Code Section 2699	13
	7. Approximate Aggregate Amount In Controversy	15
	B. Attorneys’ Fees and Costs.....	16
VI.	VENUE.....	17
VII.	NOTICE TO STATE COURT AND TO PLAINTIFF	17
VIII.	PRAYER FOR REMOVAL.....	18

TABLE OF AUTHORITIES

	Page(s)
Federal Cases	
<i>Armstrong v. Church of Scientology Int'l,</i> 243 F.3d 546 (9th Cir. 2000)	4
<i>Baumann v. Chase Inv. Svcs. Corp.,</i> 747 F.3d 1117 (9th Cir. 2014)	3
<i>Castanon v. Int'l Paper Co.,</i> 2016 WL 589853 (C.D. Cal. February 11, 2016).....	5
<i>Conrad Assocs. v. Hartford Accident & Indem. Co.,</i> 994 F. Supp. 1196 (N.D. Cal. 1998).....	9
<i>Davenport v. Mut. Benefit Health & Accident Ass'n,</i> 325 F.2d 785 (9th Cir. 1963)	9
<i>Davis v. HSBC Bank Nevada, N.A.,</i> 557 F.3d 1026 (9th Cir. 2009)	5
<i>Dodson v. Spillada Maritime Corp.,</i> 951 F.2d 40 (5th Cir. 1992)	6
<i>Feao v. UFP Riverside, LLC,</i> 2017 WL 2836207 (C.D. Cal. June 26, 2017).....	11
<i>Franke v. Anderson Merchandisers LLC,</i> 2017 WL 3224656 (C.D. Cal. July 28, 2017).....	10, 11
<i>Fristoe v. Reynolds Metals Co.,</i> 615 F.2d 1209 (9th Cir. 1980)	8
<i>Galt G/S v. JSS Scandinavia,</i> 142 F. 3d 1150 (9th Cir. 1998)	9, 16
<i>Gasnik v. State Farm Ins. Co.,</i> 825 F. Supp. 245 (E.D. Cal. 1992)	7
<i>Gaus v. Miles, Inc.,</i> 980 F.2d 564 (9th Cir. 1992)	9

1	<i>Hertz Corp. v. Friend</i> , 559 U.S. 77 (2010).....	5
3	<i>Jones v. Tween Brands, Inc.</i> , 2014 WL 1607636 (C.D. Cal. Apr. 22, 2014)	11
5	<i>Kantor v. Wellesley Galleries, Inc.</i> , 704 F.2d 1088 (9th Cir. 1983)	4
7	<i>Lew v. Moss</i> , 797 F.2d 747 (9th Cir. 1986)	4
9	<i>Lewis v. Time, Inc.</i> , 83 F.R.D. 455 (E.D. Cal. 1979)	6
10	<i>McCabe v. General Foods Corp.</i> , 811 F.2d 1336 (9th Cir. 1987)	6
12	<i>Morris v. Princess Cruises, Inc.</i> , 236 F.3d 1061 (9th Cir. 2001)	6
14	<i>Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.</i> , 119 S. Ct. 1322 (1999).....	2
16	<i>Ritchey v. Upjohn Drug Co.</i> , 139 F.3d 1313 (9th Cir. 1998)	6
18	<i>Ritenour v. Carrington Mortg. Servs. LLC</i> , 228 F. Supp. 3d. 1025 (C.D. Cal. 2017)	11
20	<i>Sanchez v. Monumental Life Ins.</i> , 103 F.3d 398 (9th Cir. 1996)	9
22	<i>Soliman v. Philip Morris, Inc.</i> , 311 F. 3d 966 (9th Cir. 2002)	8
24	<i>State Farm Mut. Auto Ins. Co. v. Dyer</i> , 19 F.3d 514 (10th Cir. 1994)	4
25	<i>Torrez v. Freedom Mortg., Corp.</i> , 2017 WL 2713400 (C.D. Cal. June 22, 2017)	11
27	<i>TPS Utilicom Serv., Inc. v. AT & T Corp.</i> , 223 F. Supp. 2d 1089 (C.D. Cal. 2002)	6

1	<i>Urbino v. Orkin Svcs. of Calif., Inc.,</i> 726 F.3d 1118 (9th Cir. 2013)	2
3	<i>Valdez v. Allstate Ins., Co.,</i> 372 F.3d 1115 (9th Cir. 2004)	9
5	<i>Viking River Cruises, Inc .v. Moriana,</i> 142 S. Ct. 1906 (2022).....	3
7	<i>Yocupicio v. PAE Grp., LLC,</i> 795 F.3d 1057 (9th Cir. 2015)	3
9	<i>Zavala v. Deutsche Bank Trust Co. Americas,</i> 2013 WL 3474760 (N.D. Cal. July 10, 2013)	4

10 State Cases

11	<i>Iskanian v. CLS Transportation Los Angeles LLC,</i> 59 Cal. 4th 348 (2014)	3
13	<i>Martinez v. Combs</i> 49 Cal App. 4th 35 (2010)	7

15 Federal Statutes

16	28 U.S.C. 1332(c)(1).....	5
17	28 U.S.C. § 84(a)	17
18	28 U.S.C. § 1332	1, 8
19	28 U.S.C. § 1332(a)	10
20	28 U.S.C. § 1332(a)(1).....	4, 17
21	28 U.S.C. § 1332(c)(1).....	5, 6
22	28 U.S.C. § 1391(a)	17
23	28 U.S.C. § 1441	1, 17
24	28 U.S.C. § 1441(a)	3, 4, 8, 17
25	28 U.S.C. § 1446	1
26	28 U.S.C. § 1446 (b)	2

1	28 U.S.C. § 1446(b)(2)(B)	2
2	28 U.S.C. § 1446(d)	17
3	Class Action Fairness Act.....	2, 3
4	State Statutes	
5	Code Civ. Proc., § 340	10
6	Lab. Code, § 2669.3, subd.(d).....	10
7	Labor Code § 204.....	10, 11, 12
8	Labor Code § 210.....	10
9	Labor Code § 226.....	12
10	Labor Code § 226.3.....	12
11	Labor Code § 246 <i>et seq.</i>	14
12	Labor Code § 510.....	12, 13, 14
13	Labor Code § 558.....	12
14	Labor Code § 1197.....	13
15	Labor Code § 1197.1.....	13
16	Labor Code § 2699.....	13
17	Labor Code § 2699(f).....	13
18	Labor Code § 2802.....	14, 15
19	Labor Code § 6401.....	15
20	Labor Code § 6402.....	15
21	Labor Code § 6403.....	15
22	Private Attorney's General Act.....	<i>passim</i>
23	Rules	
24	Federal Rules of Civil Procedure Rule 21	6

1 Federal Rules of Civil Procedure Rule 23 3

2 **Other Authorities**

3 *Garcia v. Tractor Supply Company*,
4 2019 WL 11892104 (Riverside County Sup. Ct.) 16

5 *Lathan v. Tractor Supply Company*,
6 2019 WL 8997946 (Riverside County Sup. Ct.) 16

7 *O' Shea v. SleepQuest Inc.*,
8 2022 WL 3368294 (San Mateo County Sup. Ct.) 16

9 *Parm v. Think Together*,
10 2021 WL 9637677 (San Bernardino County Sup. Ct.) 16

11 *Soratorio v. Tesoro Ref.*
12 2017 WL 1520416, at *3 (C.D. Cal. April 26, 2017) 11

13 *Teeba et al v. Brill Inc.*,
14 2022 WL 18213920 (San Bernardino County Sup. Ct.) 16

1 **TO THE UNITED STATES DISTRICT COURT OF THE EASTERN**
2 **DISTRICT OF CALIFORNIA AND TO FRANCISCO BELLO AND HIS**
3 **ATTORNEYS OF RECORD:**

4 **PLEASE TAKE NOTICE** that Defendants THE AMERICAN BOTTLING
5 COMPANY; KEURIG DR PEPPER INC.; and TAYLOR MARCUS hereby remove the
6 above-referenced action from the Superior Court for the County of San Joaquin to the
7 United States District Court for the Eastern District of California pursuant to 28 U.S.C.
8 sections 1441 and 1446, based on diversity of citizenship jurisdiction (28 U.S.C. section
9 1332). The removal is proper for the following reasons:

10 **I. BACKGROUND**

11 1. On August 31, 2022, Plaintiff Francisco Bello (“Plaintiff”) filed the instant
12 Private Attorney’s General Act (“PAGA”) Complaint in the Superior Court of California
13 for the County of San Joaquin, entitled *Francisco Bello v. The American Bottling*
14 *Company; Keurig Dr Pepper Inc.; Taylor Marcus; and DOES 1 through 100, inclusive*,
15 Case No. STK-CV-UOE-2022-7696 (“PAGA Complaint”). Prior to filing this case, on
16 June 23, 2022, Plaintiff filed a separate class action complaint in the Superior Court of
17 California for the County of San Joaquin, entitled *Francisco Bello v. The American*
18 *Bottling Company; Keurig Dr Pepper Inc.; Taylor Marcus; and DOES 1 through 100,*
19 *inclusive*, Case No. STK-CV-UOE-2022-5279 (“Class Action Complaint”). The Class
20 Action Complaint was removed to the United States District Court, Eastern District of
21 California on July 27, 2022 and assigned case no. 2:22-cv-01333-KJM-KJN. [Dkt. 1].

22 2. The PAGA Complaint asserts a single cause of action against Defendants for
23 violation of PAGA penalties, based on alleged violation of California Labor Code
24 sections “96, 98.6, 200, 201, 203, 204, 210, 226, 226.3, 226.7, 227.3, 232, 232.5, 246, et.
25 seq., 432, 510, 512, 558, 1102.5, 1174, 1174.5, 1194, 1197, 1197.1, 1197.5, 1198.5,
26 2699, 2802, 2810.5, 6401 et. seq., 6409.1, and 6432, among others.” (Ex. A, Complaint ¶
27 6.)

1 3. Plaintiff brings this PAGA Complaint on behalf of himself individually, and
 2 on behalf of all other aggrieved employees. (Ex. A, Complaint p.1; ¶¶ 4-7.)

3 4. On March 8, 2023 counsel for Defendants signed a Notice and
 4 Acknowledgement of Receipt of the Summons and Complaint. A true and correct copy of
 5 the complaint packet received by Defendants, including the Complaint, is attached as
 6 **Exhibit A** to the Declaration of Laura Heyne (“Heyne Decl”). The Notice and
 7 Acknowledgement of Receipt of the Summons and Complaint is attached as **Exhibit B** to
 8 the Heyne Decl.

9 5. On April 6, 2023, Defendants timely filed their Answer to Plaintiff’s PAGA
 10 Complaint. A true and correct copy of the Answer is attached to the Heyne Decl. as
 11 **Exhibit C**.

12 6. As discussed in greater detail below, Defendants are citizens of Delaware,
 13 Massachusetts, and Texas, and Plaintiff is a citizen of California.

14 7. All Defendants consent to this removal.

15 **II. TIMELINESS OF REMOVAL**

16 8. This Notice of removal is timely as it is filed within thirty (30) days of
 17 service of the Summons and Complaint on Defendants on March 8, 2023. 28 U.S.C. §
 18 1446 (b); *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 119 S. Ct. 1322 (1999)
 19 (thirty-day deadline to remove commences upon service of the summons and complaint).

20 9. A defendant has 30 days after service to file a Notice of Removal. 28 U.S.C.
 21 § 1446(b)(2)(B).

22 **III. INDIVIDUAL PAGA ACTIONS, LIKE THIS ONE, ARE SUBJECT TO 23 REMOVAL BASED ON DIVERSITY OF CITIZENSHIP**

24 10. A *representative* PAGA action cannot be removed under the Class Action
 25 Fairness Act (“CAFA”) because a PAGA claim is not a “class- action” claim, and the
 26 aggregate value of the civil penalties sought by all “aggrieved employees” in a PAGA
 27 action cannot be aggregated for purposes of removal to federal court under either
 28 ordinary diversity jurisdiction or CAFA. *See Urbino v. Orkin Svcs. of Calif., Inc.*, 726

1 F.3d 1118, 1121-23 (9th Cir. 2013) [holding that the claims of all “aggrieved employees”
2 cannot be aggregated to establish the \$75,000 threshold for diversity jurisdiction because
3 aggrieved employees do not have a “common and undivided interest” in those
4 penalties]; *Baumann v. Chase Inv. Svcs. Corp.*, 747 F.3d 1117, 1124 (9th Cir. 2014)
5 [holding that “PAGA is not sufficiently similar to Rule 23 to establish the original
6 jurisdiction of a federal court under CAFA”]; *Yocupicio v. PAE Grp., LLC*, 795 F.3d
7 1057, 1062 (9th Cir. 2015)[holding that the amounts sought in plaintiff’s non-class PAGA
8 claim could not be added to the amounts sought in plaintiff’s class claims in order to meet
9 the \$5 million threshold for CAFA jurisdiction].

10 11. Until recently, California law has held that a representative PAGA action
11 cannot be divided into individual PAGA claims and representative PAGA claims.
12 *Iskanian v. CLS Transportation Los Angeles LLC*, 59 Cal. 4th 348 (2014) However, on
13 June 15, 2022, the United States Supreme Court in *Viking River Cruises, Inc. v. Moriana*
14 held that claims brought under the California Private Attorneys General Act (PAGA) can
15 be split into individual PAGA claims, and non-individual PAGA claims brought on
16 behalf of other individuals. *Viking River Cruises, Inc .v. Moriana*, 142 S. Ct. 1906
17 (2022).

18 12. Here, Plaintiff brings this action as a PAGA action individually, and on
19 behalf of other aggrieved employees. (Ex. A, Complaint p.1; ¶¶ 4-7.) Because *Viking*
20 *River Cruises* permits Plaintiff’s PAGA action to be split to separate his **individual**
21 PAGA claims, removal is proper under 28 U.S.C. section 1441(a) (non-CAFA removal).
22 Accordingly, and as discussed in detail below, pursuant to 28 U.S.C. section 1441(a),
23 Plaintiff’s singular PAGA claim is subject to removal because the **individual** component
24 of Plaintiff’s PAGA claim satisfies the diversity requirements: (1) there is diversity of
25 citizenship between Plaintiff and Defendants; and (2) the \$75,000 jurisdictional minimum
26 is met.

1 **IV. JURISDICTION BASED ON DIVERSITY OF CITIZENSHIP**

2 13. The Court has original jurisdiction of this action under 28 U.S.C. section
 3 1332(a)(1). As set forth below, this action is removable pursuant to the provisions of 28
 4 U.S.C. section 1441(a) as the action is between citizens of different states, and the
 5 amount in controversy is in excess of \$75,000.

6 **A. Plaintiff Is A Citizen of California**

7 14. For purposes of determining diversity, a person is a “citizen” of the state in
 8 which he or she is domiciled. *Kantor v. Wellesley Galleries, Inc.*, 704 F.2d 1088, 1090
 9 (9th Cir. 1983) (“To show state citizenship for diversity purposes under federal common
 10 law a party must ... be domiciled in the state”). Residence is *prima facie* evidence of
 11 domicile. *State Farm Mut. Auto Ins. Co. v. Dyer*, 19 F.3d 514, 520 (10th Cir. 1994) (“the
 12 place of residence is *prima facie* the domicile”); *see also Zavala v. Deutsche Bank Trust
 13 Co. Americas*, 2013 WL 3474760, at *3 (N.D. Cal. July 10, 2013) (where a plaintiff’s
 14 complaint alleges he resides in California, “in the absence of evidence to the contrary,
 15 [plaintiff] is a California citizen for diversity purposes”). Citizenship is determined by the
 16 individual’s domicile at the time that the lawsuit is filed. *Armstrong v. Church of
 17 Scientology Int’l*, 243 F.3d 546, 546 (9th Cir. 2000) (“For purposes of diversity
 18 jurisdiction, an individual is a citizen of his or her state of domicile, which is determined
 19 at the time the lawsuit is filed”) (citing *Lew v. Moss*, 797 F.2d 747, 750 (9th Cir. 1986)).

20 15. Plaintiff alleges that he resides in the State of California. (Ex. A,
 21 Complaint, ¶ 29) (“Plaintiff Francisco Bello is a resident of the State of California.”) In
 22 his employment files, Plaintiff listed his home address as being in Turlock, California.
 23 (Tynan Decl., ¶ 5.) Plaintiff’s intent to remain domiciled in California is further evident
 24 from the fact that he brought his lawsuit against Defendants in San Joaquin County
 25 Superior Court. Accordingly, Plaintiff is a citizen of California.

26 **B. Defendants ABC and KDP Are Not Citizens Of California**

27 16. Defendants ABC and KDP are not now, nor were at the time this action
 28 commenced, citizens of the State of California. Rather, they are and were citizens of

1 Delaware, Massachusetts, and Texas. For diversity purposes, a “corporation is a citizen of
 2 (1) the state under whose laws it is organized or incorporated; and (2) the state of its
 3 ‘principal place of business.’” *Davis v. HSBC Bank Nevada, N.A.*, 557 F.3d 1026, 1028
 4 (9th Cir. 2009) (citing 28 U.S.C. 1332(c)(1)); *Castanon v. Int’l Paper Co.*, 2016 WL
 5 589853, at *2 (C.D. Cal. February 11, 2016). Under the “nerve center” test, the principal
 6 place of business is the state where the “officers direct, control, and coordinate” the
 7 corporation’s activities and where the corporation maintains its headquarters:

8 We conclude that ‘principal place of business’ is best read as referring to the
 9 place where a corporation’s officers direct, control, and coordinate the
 10 corporation’s activities. It is the place that Courts of Appeals have called the
 11 corporation’s ‘nerve center.’ **And in practice it should normally be the**
 12 **place where the corporation maintains its headquarters — provided**
 13 **that the headquarters is the actual center of direction, control, and**
 14 **coordination, i.e., the ‘nerve center.’**

15 *Hertz Corp. v. Friend*, 559 U.S. 77, 92-93 (2010).

16 17. Defendants are incorporated under the laws of the State of Delaware. (Tynan
 17 Decl., ¶ 7.)

18 18. KDP’s principal place of business and headquarters are in both Burlington,
 19 Massachusetts and Frisco, Texas. (Tynan Decl., ¶ 8.) KDP’s high-level officers direct,
 20 control, and coordinate corporate activities from these dual headquarters. (*Id.*)
 21 Additionally, the majority of KDP’s executive and administrative functions are directed
 22 from Massachusetts and Texas, including corporate finance, accounting, purchasing,
 23 marketing, and information systems. (*Id.*) Accordingly, KDP was at the time this action
 24 was commenced, and remains today, a citizen of the States of Delaware, Texas, and
 25 Massachusetts within the meaning of 28 U.S.C. section 1332(c)(1), and not a citizen of
 26 the State of California.

27 19. ABC’s principal place of business and headquarters is in Frisco, Texas.
 28 (Tynan Decl., ¶ 9.) ABC’s high-level officers direct, control, and coordinate corporate

1 activities from Frisco, Texas. (*Id.*) Additionally, the majority of ABC's executive and
2 administrative functions are directed from Texas, including corporate finance,
3 accounting, purchasing, marketing, and information systems. (*Id.*) Accordingly, ABC
4 was at the time this action was commenced, and remains today, citizens of the States of
5 Delaware and Texas within the meaning of 28 U.S.C. section 1332(c)(1), and not citizens
6 of the State of California.

7 **C. The Citizenship of "Sham" Defendant Taylor Marcus Must Be
8 Disregarded.**

9 20. Defendant Marcus must be disregarded for purposes of diversity because he
10 is a "sham" defendant, i.e., he cannot be found liable as a matter of law. *See, e.g., Morris*
11 *v. Princess Cruises, Inc.*, 236 F.3d 1061, 1067 (9th Cir. 2001).

12 21. It is well-settled that a party cannot attempt to defeat diversity of citizenship
13 jurisdiction by adding "sham" defendants. *See, e.g., Morris*, 236 F.3d at 1067; *Dodson v.*
14 *Spillada Maritime Corp.*, 951 F.2d 40, 42 (5th Cir. 1992); *TPS Utilicom Serv., Inc. v. AT*
15 *& T Corp.*, 223 F. Supp. 2d 1089, 1100-1101 (C.D. Cal. 2002) (same).

16 22. Joinder of a defendant is a "sham" and is fraudulent if the defendant cannot
17 be liable to the plaintiff on any theory alleged in the complaint. *See, e.g., Ritchey v.*
18 *Upjohn Drug Co.*, 139 F.3d 1313, 1318 (9th Cir. 1998); *McCabe v. General Foods Corp.*,
19 811 F.2d 1336, 1339 (9th Cir. 1987).

20 23. When determining whether a defendant is fraudulently joined, "[t]he court
21 may pierce the pleadings, consider the entire record, and determine the basis of joinder by
22 any means available." *Lewis v. Time, Inc.*, 83 F.R.D. at 455 ("[I]t is well settled that upon
23 allegations of fraudulent joinder . . . federal courts may look beyond the pleadings to
24 determine if the joinder . . . is a sham or fraudulent device to prevent removal.");
25 *McCabe*, 811 F.2d at 1339 (a defendant "is entitled to present the facts showing the
26 joinder to be fraudulent").

27 24. If the facts reveal that joinder is fraudulent, the defendant may be dismissed
28 from the action pursuant to Rule 21 of the Federal Rules of Civil Procedure, which

1 provides that “[p]arties may be dropped or added by order of the court on motion of any
 2 party ... at any stage of the action and on such terms as are just.” *Gasnik v. State Farm*
 3 *Ins. Co.*, 825 F. Supp. 245, 248-249 (E.D. Cal. 1992).

4 25. As noted above, Plaintiff’s PAGA Complaint arises from a single cause of
 5 action for PAGA penalties. Plaintiff’s PAGA Complaint contains no individualized
 6 factual allegations against individual defendant Marcus, other than to allege that he was a
 7 “joint employer” with the other corporate defendants. (Ex. A, Complaint ¶ 36.)

8 26. Marcus was never a “joint employer” of Plaintiff. Whether or not a business
 9 or a person is a joint employer will depend upon a factually-specific inquiry regarding
 10 their involvement with the workers. In *Martinez v. Combs*, the California Supreme Court
 11 held that in order to establish an individual or entity is a joint employer, a plaintiff must
 12 establish that the alleged joint employer suffered or permitted a plaintiff to work or
 13 exercised control over his wages, hours or working conditions. *Martinez v. Combs* (2010)
 14 49 Cal App. 4th 35, 59-60. The California Supreme Court in *Martinez* also identified a
 15 number of factors that could support a finding of joint employer liability:

- 16 ► Who controlled the wages, hours, and working conditions?
- 17 ► Who offered employment to the workers?
- 18 ► Whom did the workers view as supervisors?
- 19 ► Who had the power to direct the work of the pickers?
- 20 ► Who had the power to prevent the actual employer from paying inadequate
 21 wages?

22 *Id.*

23 27. Here, Plaintiff’s PAGA Complaint does not include a single allegation that
 24 would establish Marcus as a joint employer, other than the conclusory allegation that
 25 “Plaintiff is informed and believes, and based thereon alleges that Defendants, and each
 26 of them, are joint employers.” (Ex. A, Complaint ¶ 36). This failure alone is enough to
 27 establish Marcus is included only as a sham defendant, and must be disregarded for
 28 diversity purposes.

1 28. Additionally, as set forth in the Marcus Declaration, Marcus did not “suffer
2 or permit” Plaintiff to work. Marcus was not Plaintiff’s direct manager or supervisor.
3 (Declaration of Taylor Marcus “Marcus Decl.”, ¶¶ 2-5.) During Plaintiff’s three month
4 employment with Defendant ABC in 2021, Marcus was based out of Los Angeles,
5 California—he was not based out of the Stockton, California site that Plaintiff worked at.
6 (Id.). Accordingly, Marcus did not have any direct insight or control over Plaintiff’s
7 working conditions, the hours Plaintiff worked, or the circumstances surrounding
8 Plaintiff taking his meal and rest breaks. (Id.). Marcus did not set Plaintiff’s wages, and
9 did not have control over how Plaintiff was paid. (Id.).

10 29. As such, there is no factual basis to support a PAGA claim for penalties
11 against Defendant Marcus as a “joint employer,” and he must be disregarded as a sham
12 defendant.

13 **D. Doe Defendants Have No Bearing on Diversity.**

14 30. Pursuant to 28 U.S.C. § 1441(a), the residence of fictitious and unknown
15 defendants should be disregarded for purposes of establishing removal jurisdiction under
16 28 U.S.C. § 1332. *Fristoe v. Reynolds Metals Co.*, 615 F.2d 1209, 1213 (9th Cir. 1980)
17 (unnamed defendants are not required to join in a removal petition); *see also Soliman v.*
18 *Philip Morris, Inc.*, 311 F.3d 966, 971 (9th Cir. 2002) (“citizenship of fictitious
19 defendants is disregarded for removal purposes and becomes relevant only if and when
20 the plaintiff seeks leave to substitute a named defendant”). Indeed, the presence of
21 “DOE” defendants in this case has no bearing on diversity of citizenship for removal.
22 Thus, the existence of “DOES 1-100” in the PAGA Complaint does not deprive this
23 Court of jurisdiction.

1 **V. AMOUNT IN CONTROVERSY¹**

2 31. While Defendants deny any liability as to Plaintiff's claims, the amount in
 3 controversy requirement is satisfied because "it is more likely than not" that the amount
 4 exceeds the jurisdictional minimum of \$75,000. *See Sanchez v. Monumental Life Ins.*,
 5 103 F.3d 398, 403-04 (9th Cir. 1996) ("[T]he defendant must provide evidence
 6 establishing that it is 'more likely than not' that the amount in controversy exceeds [the
 7 threshold] amount.") (internal quotations and citations omitted).

8 32. As explained by the Ninth Circuit, "the amount-in-controversy inquiry in the
 9 removal context is not confined to the face of the complaint." *Valdez v. Allstate Ins., Co.*,
 10 372 F.3d 1115, 1117 (9th Cir. 2004) (finding that the Court may consider facts presented
 11 in the removal petition). When the amount in controversy is not apparent from the face of
 12 the complaint, a defendant may state underlying facts supporting its assertion that the
 13 amount in controversy exceeds the jurisdictional threshold. *Gaus v. Miles, Inc.*, 980 F.2d
 14 564, 566-67 (9th Cir. 1992).

15 33. In determining the amount in controversy, the Court must consider the
 16 aggregate of general damages, special damages, punitive damages, and attorneys' fees.
 17 *Galt G/S v. JSS Scandinavia*, 142 F. 3d 1150, 1156 (9th Cir. 1998) (claims for statutory
 18 attorneys' fees to be included in amount in controversy, regardless of whether such an
 19 award is discretionary or mandatory); *Davenport v. Mut. Benefit Health & Accident*
 20 *Ass'n*, 325 F.2d 785, 787 (9th Cir. 1963) (punitive damages must be taken into account
 21 where recoverable under state law); *Conrad Assocs. v. Hartford Accident & Indem. Co.*,
 22 994 F. Supp. 1196, 1198 (N.D. Cal. 1998) ("amount in controversy" includes claims for
 23 general and special damages, including attorneys' fees and punitive damages).

24 34. Here, Plaintiff's only cause of action is for PAGA penalties based on
 25 numerous underlying Labor Code violations. However, the amount of recovery Plaintiff
 26

27 28 ¹ Defendants' assertion that the amount in controversy exceeds \$75,000 is not an
 admission that Plaintiff is entitled to any recovery. Defendants deny that Plaintiff is
 entitled to, or will recover, any penalties in this matter.

1 would obtain if successful on his PAGA claims, in combination with the attorneys' fees
 2 that might be awarded if Plaintiff prevails, establish by a preponderance of the evidence
 3 that the amount in controversy exceeds \$75,000 as required by 28 U.S.C. § 1332(a).

4 **A. Plaintiff's Individual PAGA Claim**

5 **1. PAGA Period and Pay Periods**

6 35. Plaintiff was employed with Defendant ABC from September 13, 2021 –
 7 December 15, 2021, and worked a total of 14 pay periods. (Tynan Decl., ¶¶ 4-6.) Plaintiff
 8 was paid \$21.25 per hour, and received weekly pay checks. In *general*, a PAGA period is
 9 calculated as one year prior to the date of filing the complaint, plus 65 days for the PAGA
 10 notice period. (Code Civ. Proc., § 340; Lab. Code, § 2669.3, subd. (d).)

11 36. Here, Plaintiff filed his LWDA letter on June 20, 2022, and subsequently
 12 filed his PAGA Complaint on August 31, 2022. (See, Complaint, *generally*.) The entirety
 13 of Plaintiff's employment, therefore, falls within the one-year statute of limitations
 14 period.

15 **2. PAGA Penalties Under Labor Code Section 210**

16 **Untimely Payment of Wages During Employment**

17 37. Plaintiff seeks civil penalties under Labor Code Section 210 for the alleged
 18 failure to timely pay wages during employment in violation of Labor Code Section 204.
 19 (Ex. A, Complaint ¶¶ 38-40.)

20 38. Section 210 provides for a civil penalty of \$100 for any initial violation and
 21 \$200 for subsequent violation plus 25 percent of any amount unlawfully withheld.

22 39. Plaintiff alleges that Defendants had a “policy or practice” of failing to pay
 23 wages to employees. (Ex. A, Complaint ¶¶ 10-11.) District Courts have concluded that
 24 alleging a policy of noncompliance in a complaint justifies the assumption of a 100
 25 percent violation rate. *See Franke v. Anderson Merchandisers LLC*, 2017 WL 3224656,
 26 at *2 (C.D. Cal. July 28, 2017) (“Courts in this Circuit have generally found the amount
 27 in controversy satisfied where a defendant assumes a 100% violation rate based on
 28 allegations of a ‘uniform’ illegal practice—or other similar language—and where the

1 plaintiff offers no evidence rebutting this violation rate"); *Torrez v. Freedom Mortg.,*
2 *Corp.*, 2017 WL 2713400, at *3-5 (C.D. Cal. June 22, 2017) (where complaint alleged
3 "FMC engaged in a pattern and practice of wage abuse against its hourly-paid or non-
4 exempt employees within the state of California," the complaint "can reasonably be
5 interpreted to imply nearly 100% violation rates"); *Franke v. Anderson Merchandisers*
6 *LLC*, 2017 WL 3224656, at *2 (C.D. Cal. July 28, 2017) ("Courts in this Circuit have
7 generally found the amount in controversy satisfied where a defendant assumes a 100%
8 violation rate based on allegations of a 'uniform' illegal practice – or other similar
9 language – and where the plaintiff offers no evidence rebutting this violation rate"); *Feao*
10 *v. UFP Riverside, LLC*, 2017 WL 2836207, at *5 (C.D. Cal. June 26, 2017) ("Plaintiff's
11 allegations contain no qualifying words such as 'often' or 'sometimes' to suggest less
12 than uniform violation that would preclude a 100 percent violation rate."); *Soratorio v.*
13 *Tesoro Ref.* 2017 WL 1520416, at *3 (C.D. Cal. April 26, 2017) ("Plaintiff's Complaint
14 could be reasonably read to allege a 100% violation rate. The Complaint notes that
15 Defendants 'did not provide' Plaintiff and the other class members 'a thirty minute meal
16 period for every five hours worked,' and that this was Defendants' 'common practice.' It
17 also alleges that Defendants had a practice of 'requiring employees to work for four hours
18 and more without a rest period' and that Defendants had a 'common practice' of failing
19 to provide required breaks."); *Ritenour v. Carrington Mortg. Servs. LLC*, 228 F. Supp.
20 3d. 1025, 1030 (C.D. Cal. 2017) ("Given the vague language of the Complaint and the
21 broad definition of the class, it is reasonable for Defendants to assume a 100% violation
22 rate – especially since Plaintiffs offer no alternative rate to challenge Defendant's
23 calculations."); *Jones v. Tween Brands, Inc.*, 2014 WL 1607636, at *3 (C.D. Cal.
24 Apr. 22, 2014) (using 100 percent violation rate for waiting-time penalties since the
25 complaint did not limit the number or frequency of violations).

26 40. As stated above, Plaintiff worked approximately 14 pay periods during the
27 relevant time period. Accordingly, the amount in controversy for Plaintiff's individual
28 PAGA claim for the alleged violation of Labor Code Section 204 would be

1 approximately \$1,400 ($\100×14 pay periods) for Plaintiff's Labor Code Section 204
 2 claim.²

3 **3. PAGA Penalties Under Labor Code Section 226.3**
 4 Inaccurate Wage Statements

5 41. Plaintiff claims that he is entitled to civil penalties under Labor Code
 6 Section 226.3 for the alleged failure to provide accurate wage statements in violation of
 7 Labor Code Section 226. (Ex. A, Complaint, ¶¶ 41-45.)

8 42. Labor Code Section 226.3 provides for a civil penalty of \$250 per employee
 9 per violation in an initial citation and \$1,000 per employee for each violation in a
 10 subsequent citation.

11 43. Plaintiff alleges that Defendants had a "policy or practice" of failing to pay
 12 wages to employees. (Ex. A, Complaint, ¶¶ 10-11.) Defendants are entitled to assume a
 13 100 percent violation rate for the reasons enumerated above.

14 44. As stated above, Plaintiff worked approximately 14 pay periods during the
 15 relevant time period. Accordingly, the amount in controversy for Plaintiff's individual
 16 PAGA claim for the alleged violation of Labor Code Section 226 would be
 17 approximately \$3,500 ($\250×14 pay periods).

18 **4. PAGA Penalties Under Labor Code Section 558**
 19 Failure to Pay Overtime

20 45. Plaintiff claims that he is entitled to civil penalties under Labor Code
 21 Section 558 for the alleged failure to pay overtime in violation of Labor Code Section
 22 510 (Ex. A, Complaint, ¶¶ 46-48.)

23 46. Labor Code Section 558 provides for a civil penalty of \$50 per employee per
 24 pay period for an initial violation and \$100 per employee per pay period for each
 25 subsequent violation.

26 ² Defendant disputes that PAGA permits stacking of penalties (i.e., more than one civil
 27 penalty in any given pay period). Nevertheless, as Plaintiff is alleging multiple civil
 28 penalties, Defendant is entitled to assume stacking of PAGA penalties in calculating the
 amount in controversy for purposes of this Notice of Removal.

47. Plaintiff alleges that Defendants had a “policy or practice” of failing to pay wages to employees. (Ex. A, Complaint, ¶¶ 10-11.) Defendants are entitled to assume a 100 percent violation rate for the reasons enumerated above.

48. As stated above, Plaintiff worked approximately 14 pay periods during the relevant time period. Accordingly, the amount in controversy for Plaintiff's individual PAGA claim for the alleged violation of Labor Code Section 510 would be approximately \$700 ($\50×14 pay periods)

5. PAGA Penalties Under Labor Code Section 1197.1

Failure to Pay Minimum Wage

49. Plaintiff seeks civil penalties under Labor Code Section 1197.1 for the alleged failure to pay minimum wage in violation of Labor Code Section 1197. (Ex. A, Complaint, ¶¶ 55-57.)

50. Labor Code Section 1197.1 provides for a civil penalty of \$100 per employee per pay period for an initial violation that is intentionally committed and \$250 per employee per pay period for each subsequent violation for the same specific offense.

51. Plaintiff alleges that Defendants had a “policy or practice” of failing to pay wages to employees. (Ex. A, Complaint, ¶¶ 10-11.) Defendants are entitled to assume a 100 percent violation rate for the reasons enumerated above.

52. As stated above, Plaintiff worked approximately 14 pay periods during the relevant time period. Accordingly, the amount in controversy for Plaintiff's individual PAGA claim for the alleged violation of Labor Code Section 1197 would be approximately \$1,400 ($\100×14 pay periods).

6. PAGA Penalties Under Labor Code Section 2699

53. Plaintiff seeks civil penalties under Labor Code Section 2699(f) for violations of any Labor Code provisions for which there is no civil penalty specifically provided (Ex. A, Complaint, ¶¶ 58-61.)

54. Labor Code Section 2699(f) provides that for provisions of the Labor Code for which a civil penalty is not specifically provided, the civil penalty is \$100 for each

1 aggrieved employee per pay period for the initial violation and \$200 for each aggrieved
2 employee per pay period for each subsequent violation.

3 Failure to Provide Meal Periods

4 55. Plaintiff alleges that “Defendants had and have a policy or practice of failing
5 to provide Plaintiff and other Aggrieved Employees a thirty (30) minute uninterrupted,
6 timely, and complete meal period” in violation of Labor Code Section 510 (Ex. A,
7 Complaint ¶ 12.) Defendants are entitled to assume a 100 percent violation rate for the
8 reasons enumerated above.

9 56. As stated above, Plaintiff worked approximately 14 pay periods during the
10 relevant time period. Accordingly, the amount in controversy for Plaintiff’s individual
11 PAGA claim for the alleged violation of Labor Code Section 510 would be
12 approximately \$1,400 (\$100 × 14 pay periods).

13 Failure to Provide Sick Leave

14 57. Plaintiff alleges that “Defendants failed to provide Plaintiff and other
15 Aggrieved Employees with the amount of paid sick leave required to be provided
16 pursuant to California law” in violation of Labor Code Section 246 *et seq.* (Ex. A,
17 Complaint ¶ 20.) Defendants are entitled to assume a 100 percent violation rate for the
18 reasons enumerated above.

19 58. As stated above, Plaintiff worked approximately 14 pay periods during the
20 relevant time period. Accordingly, the amount in controversy for Plaintiff’s individual
21 PAGA claim for the alleged violation of Labor Code Section 246 *et seq.* would be
22 approximately \$1,400 (\$100 × 14 pay periods).

23 Failure to Reimburse Business Expenses

24 59. Plaintiff alleges that “Defendants have had a policy or practice of failing and
25 refusing, and continue to fail and refuse, to reimburse employees” in violation of Labor
26 Code Section 2802. (Ex. A, Complaint ¶ 18.)

27 60. As stated above, Plaintiff worked approximately 14 pay periods during the
28 relevant time period. Accordingly, the amount in controversy for Plaintiff’s individual

1 PAGA claim for the alleged violation of Labor Code Section 2802 would be
2 approximately \$1,400 (\$100 × 14 pay periods).

3 Unsafe Working Conditions

4 61. Plaintiff alleges that “Defendants have had a policy or practice of failing to
5 furnish and use safety devices and safeguards, and adopt and use practices, means,
6 methods, operations and processes which are reasonably adequate to render such
7 employment and place of employment safe and healthful, in violation of Labor Code
8 section 6401.” (Ex. A, Complaint ¶ 25.)

9 62. Plaintiff further alleges that “Defendants have had a policy or practice of
10 requiring or permitting employees to go or be in any employment or place of employment
11 which is not safe and healthful in violation of Labor Code section 6402.” (Ex. A,
12 Complaint ¶ 25.)

13 63. Plaintiff also alleges that “Defendants have had a policy or practice of
14 failing or neglecting to … adopt and use methods and processes reasonably adequate to
15 render the employment and place of employment safe and do every other thing
16 reasonably necessary to protect the life, safety, and health of employees in violation of
17 Labor Code section 6403.” (Ex. A, Complaint ¶ 25.)

18 64. Defendants are entitled to assume a 100 percent violation rate for the reasons
19 enumerated above.

20 65. As stated above, Plaintiff worked approximately 14 pay periods during the
21 relevant time period. Accordingly, the amount in controversy for Plaintiff’s individual
22 PAGA claim for violating Labor Code Sections 6401, 6402, and 6403 would be
23 approximately \$4,200 (\$100 × 3 Labor Code sections × 14 pay periods).

24 **7. Approximate Aggregate Amount In Controversy**

25 66. Although Defendants deny Plaintiff’s allegations that he is entitled to any
26 relief for the above-mentioned claims, based on the forgoing calculations, the aggregate
27 amount in controversy for Plaintiff’s individual PAGA claims, exclusive of attorneys’
28 fees, is approximately **\$15,400**, calculated as follows:

1	\$1,400	Failure to Timely Pay Wages During Employment
2	\$3,500	Inaccurate Wage Statements
3	\$700	Failure to Pay Overtime
4	\$1,400	Failure to Pay Minimum Wage
5	\$1,400	Failure to Provide Meal Periods
6	\$1,400	Failure to Provide Sick Leave
7	\$1,400	Failure to Reimburse Business Expenses
8	\$4,200	Failure to Provide Safe Working Conditions

9 **B. Attorneys' Fees and Costs**

10 67. Plaintiff also claims that he is entitled to attorneys' fees and costs. (Ex. A,
 11 Complaint at Prayer(B)). Attorneys' fees are properly considered in calculating the
 12 amount-in-controversy for purposes of removal on grounds of diversity jurisdiction. *Galt*,
 13 142 F.3d at 1156 (claims for statutory attorneys' fees to be included in amount in
 14 controversy, regardless of whether such an award is discretionary or mandatory).

15 68. Courts have also awarded far in excess of \$75,000 in attorneys' fees in cases
 16 involving claims similar to Plaintiff's PAGA claims. *See, e.g., Lathan v. Tractor Supply*
Company, 2019 WL 8997946 (Riverside County Sup. Ct.) (approving attorneys' fee
 17 award of \$250,000 in PAGA action); *Parm v. Think Together*, 2021 WL 9637677 (San
 18 Bernardino County Sup. Ct.) (approving attorneys' fee award of \$245,000 in PAGA
 19 action); *Garcia v. Tractor Supply Company*, 2019 WL 11892104 (Riverside County Sup.
 20 Ct.) (approving attorneys' fee award of \$227,000 in PAGA action); *Teeba et al v. Brill*
 21 *Inc.*, 2022 WL 18213920 (San Bernardino County Sup. Ct.) (approving attorneys' fee
 22 award of \$205,000 in PAGA action); *O' Shea v. SleepQuest Inc.*, 2022 WL 3368294 (San
 23 Mateo County Sup. Ct.) (approving attorneys' fee award of \$100,000 in PAGA action).
 24 Defendants have attached these verdicts as **Exhibit D** to the Heyne Decl.

25 69. Defendants anticipate depositions being taken in this case, and that
 26 ultimately, Defendants will file a Motion for Summary Judgment. Based on defense
 27 counsel's experience, attorneys' fees in PAGA cases often exceed \$75,000. In this regard,

1 it is more likely than not that the fees will exceed \$75,000 through discovery and a
2 summary judgment hearing, and the fees would certainly exceed \$75,000 if the case
3 proceeds to trial. (Heyne Decl., ¶ 6.)

4 70. Because diversity of citizenship exists between the Plaintiff and Defendants
5 and the matter in controversy between the parties is in excess of \$75,000, this Court has
6 original jurisdiction of the action pursuant to 28 U.S.C. § 1332(a)(1). This action is
7 therefore proper for removal to this Court.

8 **VI. VENUE**

9 71. Venue lies in the United States District Court for the Eastern District of
10 California, pursuant to 28 U.S.C. §§ 1391(a), 1441, and 84(a). This action originally was
11 brought in San Joaquin County Superior Court of the State of California, which is located
12 within the Eastern District of California. 28 U.S.C. § 84(a). Therefore, venue is proper
13 because it is the “district and division embracing the place where such action is pending.”
14 28 U.S.C. § 1441(a).

15 72. A true and correct copy of this Notice of Removal will be promptly served
16 on Plaintiff and filed with the Clerk of the San Joaquin County Superior Court of the
17 State of California as required under 28 U.S.C. § 1446(d).

18 **VII. NOTICE TO STATE COURT AND TO PLAINTIFF**

19 73. Defendants will give prompt notice of the filing of this Notice of Removal to
20 Plaintiff and to the Clerk of the Superior Court of the State of California in the County of
21 San Joaquin. The Notice of Removal is concurrently being served on all parties.

22 ///

23 ///

24 ///

25 ///

26

27

28

1 **VIII. PRAYER FOR REMOVAL**

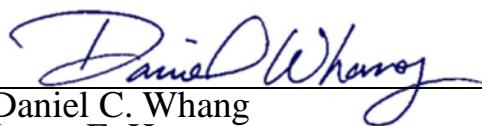
2 74. WHEREFORE, Defendants pray that this civil action be removed from
3 Superior Court of the State of California for the County of San Joaquin to the United
4 States District Court for the Eastern District of California.

5 DATED: April 7, 2023

6 Respectfully submitted,

7 SEYFARTH SHAW LLP

8 By:

9 
Daniel C. Whang

10 Laura E. Heyne
11 Attorneys for Defendant
12 BLUE CHIP COMMERCIAL
13 CLEANING, INC.